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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
Table of allotments,
FM Broadcast Stations
(Lewisville, Gainesville, Robinson,
Corsicana, Jacksboro, and
Mineral Wells, Texas)

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MM Docket No. 97-91
RM-8854

To: The Commission

APPLICATION FOR REVIEW

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Summary

This Application for Review is predicated on the legal proposition that in the *Order* issued in this proceeding the Allocations Branch (the “Branch”) ignored both the FCC’s rules and established precedent. The rulemaking petition filed by Heftel Broadcasting Corporation (“Heftel”) was an untimely counterproposal in another proceeding and therefore should have been dismissed pursuant to Section 1.420(d) of the Commission’s Rules and established precedent. Yet not only did the Branch not dismiss Heftel’s untimely counterproposal, but it rewarded Heftel by giving Heftel retroactive filing status.

Further, Jerry Snyder and Associates, Inc., had an application to provide C1 service to Mineral Wells, Texas, accepted for filing in January of 1997, which was prior to the comment date. However, rather than terminate Heftel’s rulemaking request, as required by precedent, the Branch granted Heftel’s rulemaking proposal.

Thus, under well established precedent, this Application for Review should be granted and the Commission should issue an *Order* terminating the rulemaking proceeding in MM Docket No. 97-91.

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To: The Commission

APPLICATION FOR REVIEW¹

Jerry Snyder and Associates, Inc. ("Snyder"), by its counsel, hereby respectfully submits its Application for Review of the *Report and Order*, DA 98-1650, released August 21, 1998, in the above-captioned proceeding (the "*Order*"). In regard thereto, it is stated as follows:

I. Compliance With 47 C.F.R. § 1.115(B)(2).

Pursuant to the requirements of Section 1.115(b)(2) of the Commission's Rules, Snyder hereby specifies that as shown *supra*:

The action taken in the *Order* is in conflict with statute, regulation, case precedent, and established Commission policy.

The relief sought by Snyder is the denial of Heftel Broadcasting Corporation's ("Heftel") rulemaking petition in the instant proceeding, thereby removing the impediment to the

¹Pursuant to Section 1.4(b)(1), an application for review of a rulemaking *Order* may be filed no later than thirty days of the Federal Register publication date (63 Fed. Reg. 45182) or no later than September 24, 1998.

Commission processing of Snyder's previously filed minor modification application for a Class C1 facility (BPH-961125IG) (the "Snyder Application").

II. Preliminary Statement.

In Amendment of Section 73.202(b) (Mineral Wells and Winters, Texas), 7 FCC Rcd. 1791 (1992), (Chief, Allocations Branch) (the "Branch") ("Mineral Wells"), a Class C1 channel operating on Channel 240 was allotted to Mineral Wells, Texas. On November 25, 1996, Snyder filed an application for a construction permit for minor modification of Snyder's radio station KYXS-FM from a Class C3 FM station to a Class C1 station.²

The *Order* grants a proposal in a Petition for Rulemaking originally filed by Heftel Broadcasting Corporation ("Heftel") as "Supplemental Comments" in the form of a late filed Counterproposal in *FM Table: (Farmersville N.P.R.M.)*, 11 FCC Rcd. 1790 (Chief, Allocations Branch, 1996). ("Farmersville"). In *Farmersville N.P.R.M.* at 1791 n. 3(a) The Branch admonished that late filed counterproposals "will not be considered."

In the *Farmersville* rulemaking proceeding, Heftel did not file a petition for waiver of the requirements of Section 1.420(d) of the Commission's rules, which section precludes the consideration of late filed counterproposals. The Heftel counterproposal in *Farmersville* was rejected on January 17, 1997, as untimely in *Farmersville*, 12 FCC Rcd. 4099, 4102 n. 7 (1997).³ After it was dismissed by the *Order* in *Farmersville*, Heftel never refiled its Petition for

²That application (BPH-9611251IG) was accepted for filing on Report No. 23912, released January 21, 1997.

³There is no FCC record that Heftel timely filed either a Petition for Reconsideration or an Application for Review of the dismissal of its untimely counterproposal in *Farmersville*. Therefore, its rejection is a final action, i.e. one no longer subject to administrative or judicial review.

Rulemaking. Refiling is the procedure prescribed by the FCC in dealing with untimely filed rulemaking counterproposals.⁴ Had Heftel refiled its untimely counterproposal as a rulemaking petition in the manner prescribed by the FCC's rules, (see, *Pinewood*) that new rulemaking petition would have had to be automatically dismissed as untimely because it was in conflict with Snyder's application, which application had received cut-off protection when filed on November 25, 1996.⁵

The *Notice of Proposed Rulemaking* in the instant proceeding was released March 14, 1997, 12 FCC Rcd. 3059 (Chief, Allocations Branch, 1997) (the "*NPRM*"). Nothing in the *NPRM* advised the public that the Heftel rulemaking had been previously rejected as an unauthorized counterproposal and that Heftel had never refiled it as required by established Commission precedent. See, *Pinewood*. In a Public Notice, Report No. 2251, released January 28, 1998, (the "Counterproposal P.N."), the FCC gave the unauthorized Heftel Counterproposal priority status over Snyder's application by announcing that the FCC would treat Snyder's application as a counterproposal, rather than an application filed prior to the *N.P.R.M.* Thus, although in *Farmersville*, on January 17, 1997, the Branch had rejected the Heftel rulemaking petition as violative of Section 1.420(d), in the *Order*, the Branch treated the untimely counterproposal as if it had been legitimately filed on July 26, 1996. That was five months before the filing of Snyder's application. In so doing, the FCC staff rewarded Heftel for its

⁴See, e.g. *FM Table (Pinewood, South Carolina)*, 5 FCC Rcd. 7609, 7610 ¶ 12 (1990) ("*Pinewood*"); see, also *FM Table, (Ironton, Missouri)*, 13 FCC Rcd. 6584, n. 2 (Chief, Allocations Branch 1998). ("*Ironton*").

⁵See, *Conflicts between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, 7 FCC Rcd. 4917 (1992) ("Conflicts").

violation of Section 1.420(d) of the Commission's rules by giving the untimely rulemaking counterproposal retroactive status, even though it was dismissed in *Farmersville* on January 17, 1997, and never refiled.

The FCC throughout this proceeding has never ruled on these procedural motions to dismiss Heftel's Petition for Rulemaking. Thus, the issuance of the *Counterproposal P.N.* could only be seen by Snyder as supporting the proposition that the Branch had preliminarily determined to deny Mineral Wells a Class C1 station by rejecting Snyder's application despite having previously found in *Mineral Wells* that it was in the public interest to do so and the fact that Snyder's application had been "accepted for filing" on January 21, 1997, some two months before the issuance of the *N.P.R.M.*

If the FCC had not given the untimely Heftel Rulemaking Petition retroactive status then as a rulemaking petition filed subsequent to the Snyder application cut-off date, the Heftel Petition would have to be denied, see *Conflicts*. Conversely, by giving the Heftel unauthorized rulemaking petition retroactive filing status to July 26, 1996, if it met all other FCC requirements, then pursuant to *Conflicts* the Snyder application had to be denied.

In the hope of at least achieving some measure of improved service to Mineral Wells, Snyder entered into an agreement with Heftel which was the subject of Joint Reply Comments filed by Snyder and Heftel on February 12, 1998.⁶ Prior to the *Order* issued on this proceeding on August 21, 1998, the Branch had never requested the opportunity to review the Compensation Agreement between Snyder and Heftel although the Branch obviously had the right to do so.

⁶On February 24, 1998, *Metro Broadcasters, Inc.*, ("Metro") filed a Motion to Dismiss the Joint Reply Comments as yet another unauthorized Counterproposal by Heftel. As with all other Motions to Dismiss filed in this proceeding, that Motion was never adjudicated.

However, certain assumptions must have been made by the Branch's staff in the *Order* because without these assumptions, there could be no basis at all for the conclusions reached in the *Order*. One of the assumptions had to be that there was a contractual arrangement between Heftel and Snyder which survived the FCC's rejection of the consideration agreed to be paid by Heftel to Snyder, if the FCC approved the settlement arrangement. That assumption was false. Payment of the consideration was a condition precedent to Snyder's having any further contractual obligation to Heftel. That assumption not being true, Snyder is now free to file its application for Review of the *Order* and pursue prosecution of its application.

The assumption that there still existed a contractual arrangement between Snyder and Heftel may have been behind the fact that the *Order* prescribed no deadline for Snyder to do anything to modify its outstanding application (BPH-961125IG). Because no deadlines were established in the *Order*, it is unnecessary for Snyder to file a Motion for Stay of the Order.

III. The Compensation Agreement Between Snyder and Heftel is as Dead as a Doornail.⁷

Had the Branch's staff taken the opportunity to request a copy of the Compensation Agreement between Snyder and Heftel, dated February 12, 1998, the agreement would have revealed three things.

⁷ "Marley was dead, to begin with.
There is no doubt whatever about that.

...
Old Marley was as dead as a door-
nail."

Dickens, *A Christmas Carol*, Stanza I (1843).

First, as with all contractual arrangements, if Heftel had no obligation to pay the agreed upon consideration to Snyder, then there was no “mutuality of obligation.” In the absence of mutuality of obligation, there is no enforceable agreement between the parties.⁸ The *Order’s* denial of the obligation for Heftel to pay Snyder the agreed upon consideration voided the Agreement as a matter of law. This simultaneously voided any obligation placed upon Snyder to modify its outstanding application (BPH-961125IG) by changing site or to cease from prosecuting its application already found by the FCC to be accepted for filing.

Second, the agreement expired if the agreement was not approved on its own terms as a “final order” within nine (9) months of its execution on February 12, 1998. Snyder now is free to file this application for Review, just as others also may do. Thus, in addition to the agreement being terminated as a matter of law, because a “final order” will not be in existence before the contract expires on its own terms, the contract is also terminated as a matter of fact.

Finally, the Agreement only obligated Snyder to do things *in futuro*. It did not obligate Snyder to dismiss its outstanding Motions to Dismiss or its outstanding application. Had the *Order* finally addressed Snyder’s Motions to Dismiss and granted them, then Heftel’s Petition for Rulemaking now being dismissed, Snyder was free to prosecute its outstanding application. The agreement only reflected Snyder’s desperate attempt to at least provide some greater degree of service as a C1 operation, rather than a C3 operation, even if that meant a lesser degree of service than the operation as proposed in its outstanding application.

⁸For example, if A agrees to purchase B’s home for \$X, A has no obligation to execute a deed unless B pays the \$X.

The Compensation Agreement is dead, as dead as a doornail, and Snyder is free to file this Application for Review and to request the full Commission to adjudicate the merits of the various Motions to Dismiss Heftel's Rulemaking Petition, which motions were never addressed by the Allocations Branch in the *Order*.

IV. The Order Failed to Address the Multiple Procedural Defects in Heftel's Petition for Rulemaking.

The *Administrative Procedure Act*, 5 U.S.C. § 553 (the "APA") requires that an agency must provide a reasonable explanation for its actions in issuing a Report and Order in a rulemaking proceeding. See, e.g. *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut.*, 463 U.S. 29, 43 (1983) ("*Motor Vehicle*") ("an agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency.") There were numerous pleadings filed in this proceeding which pointed out to the Branch that Heftel's rulemaking petition was filed in violation of the FCC's own rules and therefore must be dismissed. Not one scintilla of the *Order* addressed these issues, and the Branch in the *Order* never explains why it is free to ignore its own rules and well established Commission precedent.

In *Reuters Limited v. FCC*, 781 F.2d 946, 950 (D.C. 1986), the Court taught us:

[I]t is elementary that an agency must adhere to its own rules and regulations. *Ad hoc* departures from those rules, even to achieve laudable aims, cannot be sanctioned.

A. The Branch Did Not Follow Established Commission Precedent that Untimely Counterproposals in Rulemaking Proceedings Must be Dismissed.

On March 10, 1997, Snyder Filed a Motion to Dismiss Heftel's rulemaking petition on the grounds that Heftel was on legal notice in the *Farmersville NPRM*, 1791 n. 3. that for a

counterproposal to be timely it must be filed by April 5, 1996, with reply comments due April 22, 1996. Nine FM licenses were modified as a result of the *Farmersville NPRM*. In its petition for rulemaking filed on July 26, 1996, in *Farmersville*, Heftel recognized that its Counterproposal was untimely, but argued that it should be considered anyway because Heftel had been working on its petition since April of 1995. Heftel never explained why given one year to prepare its petition it could not meet the *Farmersville* deadline for filing a counterproposal of April 5, 1996. As noted in *Farmersville Order*, 12 FCC Rcd. at 4102, n. 7, the Heftel Petition was an untimely Counterproposal. 47 Fed. Reg. § 1.420(d) states that an untimely counterproposal “will not be considered.” In *FM Tables: Pinewood, South Carolina*, 5 FCC Rcd. 7609, ¶ 7 (1990) (“Pinewood”), the Commission ruled that an untimely counterproposal must be dismissed. In *Pinewood* at 7610, ¶ 12, the Commission ruled that after such an untimely rulemaking petition is dismissed the petitioner may “resubmit its petition for rulemaking . . . if conditions at that time permit it to be considered.” While in the *Farmersville Order*, 12 FCC Rcd. at 4102, n. 7, the Branch found that the Heftel Rulemaking Petition was an untimely counterproposal, the Branch did not follow the Commission’s procedure established in *Pinewood* and dismiss Heftel’s Petition that time.⁹ At the time the *Order* in *Farmersville* was issued in January 17, 1997, such conditions for refiling the Heftel Rulemaking Petition did not exist because Snyder had established cut-off protection for its application on November 25, 1996. (*See, Conflicts.*)

The Branch in the *Order* ignored Snyder’s March 10, 1997, Motion to Dismiss Heftel’s Rulemaking Petition, and ignored the Commission’s teaching in *Pinewood* that such an untimely Counterproposal must be dismissed. Rather than follow the requirements of Section 1.420(d) of

⁹This is normal Branch process. *See, Ironton*, 13 FCC Rcd. 6854, n.2.

the Rules, the teaching of *Pinewood*, and the holding in *Conflicts*, the Branch issued its *NPRM* giving the Heftel Rulemaking retroactive status to Snyder's application. Indeed, in the *Counterproposal P.N.*, the FCC rewarded Heftel by giving its untimely counterproposal cut-off preference to Snyder's application contrary to all law and precedent. In the *Order*, the FCC totally ignored these issues in contravention to the Supreme Court's teaching in *Motor Vehicle*, 463 U.S. 29 at 43.

For this reason alone the Commission should grant the application for review and reverse the *Order* dismissing the Heftel Rulemaking Petition as an untimely counterproposal that will not be considered.

B. The Bureau Should Have Terminated the Rulemaking Proceeding Upon Acceptance of Snyder's Application.

In the *N.P.R.M.* issued in this proceeding on March 14, 1997, at ¶ 6, the Branch noted that Snyder's previous attempt to provide C1 service to Mineral Wells had never been effectuated. However, the reason it had not been effectuated as was set forth in Snyder's application (BPH-961125IG) was loss of site availability due to the death of the site owner and the intransigence of his heirs. Upon sale of the site to the local municipal water district that district agreed to lease the property to Snyder.

On November 25, 1996, Snyder filed an application which reflected his expression of interest to provide C1 service to Mineral Wells, as allotted. On January 21, 1997, the FCC issued a Public Notice (Report No. 23192) accepting Snyder's application for filing.

On February 27, 1997, Heftel filed a Motion "to defer action on Snyder's applications." In response on March 10, 1997, Snyder filed a Motion to Dismiss Heftel's untimely

counterproposal in the *Farmersville* proceeding.¹⁰ As discussed *supra* neither in the *N.P.R.M.* nor in the *Order* did the Branch discuss Snyder's timely filed application which constituted an expression of interest to provide C1 service to Mineral Wells as allotted.

So too, did Metro-Broadcasters Texas, Inc. ("Metro") file numerous pleadings arguing that as a matter of law the Snyder application having not only been filed, but also accepted for filing long before the *N.P.R.M.* was issued therefore, established commission precedent required that the *N.P.R.M.* be terminated. As with Snyder's pleading arguing that Snyder was entitled to cut-off protection both because of the timely filing of its application and the case law that required that the Heftel Rulemaking Petition be dismissed, neither in the *N.P.R.M.* nor in the *Order* were Metro's pleadings on this issue even mentioned.

In its Reply Comments, filed May 20, 1997, in response to the *N.P.R.M.* and Reply Comments filed February 12, 1998, in response to the *Counterproposal P.N.*, Metro cited case after case which showed that established precedent required that the rulemaking in the instant proceeding must be terminated.

These cases universally hold that "the Commission does not delete a channel where an expression of interest is demonstrated by the filing of an application. . . . Therefore, should the Commission receive an acceptable application by the initial comment deadline specified herein . . . petitioner's proposal to delete Channel 283A at Gregory may be dismissed."¹¹ The Snyder application was filed on November 11, 1996, and accepted for filing on January 21, 1997 (Report

¹⁰For proof of filing, the cover page of that Motion is attached hereto.

¹¹*FM Table: Driscoll, Texas*, 9 FCC Rcd. 3580 (Chief, Allocations Branch, 1994).

No. 23912). The *N.P.R.M.* in this proceeding was issued on March 14, 1997, and the comment deadline was May 5, 1997.

In support of the legal proposition that the Heftel Rulemaking Petition must be dismissed because the filing of Snyder's application constituted an expression of interest Metro cited, among other cases: *FM Table: Woodville, Mississippi*, 9 FCC Rcd. 2769 (Chief, Allocations Branch 1994); *FM Table: Calhoun City, Mississippi*, 11 FCC Rcd. 7660 (Chief, Allocations Branch, 1996). As with Snyder's citation of *Pinewood* for the proposition that Heftel's untimely filed counterproposal in *Farmersville* must be dismissed and Snyder's further citation of *Conflicts* for the principle that Snyder's application entitled it to cut-off protection on November 25, 1996, in the *Order* the Branch ignored Metro's legal argument that upon the acceptance of Snyder's application by Public Notice of January 17, 1997, the proper course was for the Branch to terminate the Heftel Rulemaking Petition.

For this reason also the Commission should grant the Application for Review, reverse the *Order*, and terminate the proceeding.

V. **Conclusion.**

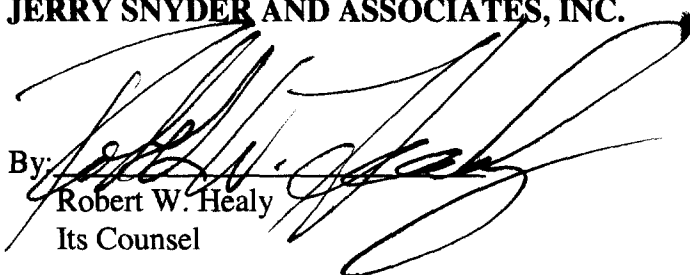
On November 25, 1996, Snyder filed an application for minor Modification of its license in order to provide C1 service to Mineral Wells, Texas, as allotted. On January 17, 1997, Snyder's application was accepted for filing. Despite this fact on March 14, 1997, the Branch issued an *N.P.R.M.* which resuscitated an untimely counterproposal and gave it *nunc pro tunc* processing treatment. Established precedent gave cut-off protection to Snyder's application both because the Heftel rulemaking counterproposal should have been dismissed pursuant to Section 1.420(d) of the FCC's rules and because Snyder's application had been accepted for filing by the

date for filing comments in this proceeding. Yet despite both Snyder's and Metro's motions to terminate the *N.P.R.M.* on these grounds, in the *Order* no mention was even made of these legal impediments to grant of Heftel's petition for rulemaking and it was granted.

Therefore, in light of the above, Jerry Snyder and Associates, Inc., hereby respectfully requests that this Application for Review be granted and the rulemaking proceeding in MM Docket No. 97-91 be terminated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Angela Y. Powell, a paralegal in the law firm of Smithwick & Belendiuk, P.C., hereby certify that on the 21st day of September, 1998, copies of the foregoing were mailed first-class, postage prepaid, to the following:

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